

Remarks

Request for Claim Status Clarification

The Summary of the Action indicates that claim 20 is pending; however, claim 20 was previously canceled. Further, the Summary of the Action indicates that claim 21 is rejected, but the detailed portion of the Action does not mention claim 21 and fails to set forth any basis for rejecting claim 21. Clarification of the record on these two points is requested in the next Action.

Further, the Action indicates that claims 46-47 are rejected under §103, but the discussion of the rejections under §102 states in part "With respect to claims ... 43-51, 63-65, Zucherman et al disclose all the limitations." Thus, it is unclear if the Examiner intended to also reject claims 46-47 under §102. For purposes of this response, Applicant assumes that claims 46-47 are rejected under §103 only; clarification of the record on this point is requested in the next Action.

Amendments to the Title

The Title is amended to delete the word "cervical," consistent with the amendments to the claims.

Amendments to the Abstract

The Abstract is amended to clarify that the apparatus and method may be used in non-cervical locations, consistent with the amendments to the claims.

Amendments to the Claims

Claims 1-4, 6-7, 11, 21, 26, and 36 have been amended. Support for these claims can be found throughout the specification, *see, e.g.*, Figs. 1-7 and accompanying text. No new matter is added. The claims as amended continue to read on the elected invention/species.

Claims 12-13, 15, 17-19, 29, 42-51, and 63-65 have been canceled, rendering further discussion thereof moot.

Claims 66-74 have been added. Support for these claims can be found throughout the specification, *see, e.g.*, Figs. 1-7 and accompanying text. No new matter is added. These added claims read on the elected invention/species.

§102 Rejections

Apparatus claims 1-8, 11, 26 stand rejected under §102 over U.S. Patent No. 6,190,387 ("Zucherman"). Reconsideration is requested.

As amended, independent claim 1 requires, *inter alia*, that the first and second wings be elongated in the same "first direction" as the spacer is elongated. The Examiner has not identified any wing in the Zucherman device as being elongated in the same direction as the spacer in Zucherman. Referring to Figs. 84-86 of Zucherman, the "spacer" 804 appears to be elongated at 90° to the elongation direction of the first and second wings 810,824. As such, Applicant submits that the Action fails to identify structure corresponding to these claimed limitation(s). Accordingly, Applicant submits that independent claim 1, and its dependent claims 2-8, 11, 26, 71-74, define patentable subject matter over the cited art.

With further regard to dependent claim 2, this claim requires that "the anterior and posterior edges of said spacer are generally rounded" with the spacer having "generally linear surfaces disposed between said anterior and posterior edges disposed so as to diverge from each other toward said posterior edge." Applicant submits such a structure has not been identified by the Examiner in Zucherman. As such, Applicant submits that this claim, and dependent claims 71-72, define patentable subject matter for this additional reason.

With further regard to dependent claim 7, this claim requires that "in cross-sectional view of said spacer normal to said longitudinal axis, a largest height of said posterior edge of said spacer taken perpendicular to a theoretical line extending between said anterior and posterior edges is greater than a corresponding largest height of said anterior edge of said spacer." Applicant submits such a structure has not been identified by the Examiner in Zucherman. As such, Applicant submits that this claim and dependent claims 73-74, define patentable subject matter for this additional reason.

Method claims 36-37, 40-41, 62 stand rejected under §102 over Zucherman. Reconsideration is requested.

As amended, independent claim 36 requires, *inter alia*, "wherein, after said fastening, said first wing, said second wing, and said spacer are elongated in a posterior to anterior direction with respect to the adjacent spinous processes." The Examiner has not identified any wing in the Zucherman device as being elongated in the same direction as the spacer in Zucherman, much less both elongated in the anterior to

posterior direction. Referring to Figs. 84-86 of Zucherman, the "spacer" 804 appears to be elongated at 90° to the elongation direction of the first and second wings 810,824. As such, Applicant submits that the Action fails to identify structure corresponding to these claimed limitation(s). Accordingly, Applicant submits that independent claim 36, and its dependent claims 37, 40-41, 62, 66-70, define patentable subject matter over the cited art.

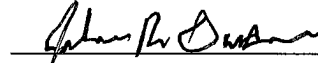
With further regard to dependent claim 68, this claim requires that the "anterior and posterior edges of said spacer are generally rounded," with "said spacer further having generally planar surfaces disposed between said anterior and posterior edges disposed so as to diverge from each other toward said posterior edge," and the method includes "wherein, after said fastening, said planar surfaces contact respective adjacent spinous processes." Applicant submits such a structure and method step has not been identified by the Examiner in Zucherman. As such, Applicant submits that this claim defines patentable subject matter for this additional reason.

With further regard to dependent claim 70, this claim requires that "said inserting a first portion of the implant comprise[] orienting a narrower cross-sectional portion of said spacer anteriorly and an thicker cross-sectional portion of said spacer posteriorly." Applicant submits such a spacer structure and method step has not been identified by the Examiner in Zucherman. As such, Applicant submits that this claim defines patentable subject matter for this additional reason.

Based on the above, Applicant submits that the present application is in condition for allowance and notice to such effect is respectfully requested. However, if any

outstanding issues or questions remain, the Examiner is encouraged to telephone the undersigned so that they may be expeditiously resolved.

Respectfully submitted,
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